Supreme Court, U. S.
FILED
FEB 19 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1979
No. 79-1273

WALTER RUMAN AND ALL OTHERS SIMILARLY SITUATED,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, BUREAU OF STATE LOTTERIES; MILTON LOPUS, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA; AND LYNN R. NELSON, EXECUTIVE DIRECTOR, BUREAU OF STATE LOTTERIES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BENJAMIN & ANGINO, P. C.
BY: NEIL J. ROVNER,
Counsel for Petitioner

4503 N. Front Street
Harrisburg, Pennsylvania 17110
(717) 238-6791

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions Involved	4
Statement of the Case	5
Reasons for Granting the Writ:	
1. The question presented in this Petition raises an important issue relating to a state's Eleventh Amendment immunity, which the United States Court of Appeals for the Third Circuit decided without opinion but which has not been, and should be, settled by this Court	7
2. The question presented in this Petition raises an important issue relating to a state's Eleventh Amendment immunity, which the United States Court of Appeals for the Third Circuit decided without opinion in a way discordant with applicable decisions of this Court	13
Conclusion	17
APPENDIX:	
Memorandum Opinion of the United States District Court for the Middle District of Pennsylvania	1a
Judgment Order of the United States Court of Appeals for the Third Circuit	16a

TABLE OF CITATIONS

CASES:

Chisholm v. Georgia, 2 U.S. 419 (2 Dall. 1973) 13

Edelman v. Jordan, 415 U.S. 651 (1974) 11, 12, 13, 14, 15

Ex Parte Young, 209 U.S. 123 (1908) 14

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 12, 17

Hutto v. Finney, 437 U.S. 678 (1978) 16

Milliken v. Bradley, 433 U.S. 267 (1977) 16

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 15, 16

Ruman v. Commonwealth of Pennsylvania, Department of Revenue, 462 F. Supp. 1355 (M.D. Pa. 1979) 2

STATUTES:

Act of August 26, 1971, P.L. 351, No. 91, as reprinted in Pa. Stat. Ann. Tit. 72 §§3761-1 through 3761-15 (Purdon's Supp. 1980) ..7, 10, 11

28 U.S.C. §1254(1) 2

CONSTITUTIONAL PROVISION:

Eleventh Amendment to the United States Constitution 3, 4, 6, 7, 11, 13, 14, 15

JOURNALS:

House Legislative Journal of June 23, 1971 9

Senate Legislative Journal of April 21, 1971 .....7, 8, 9

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No.

WALTER RUMAN AND ALL OTHERS SIMILARLY SITUATED,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE; COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF REVENUE, BUREAU OF STATE LOTTERIES; MILTON LOPUS, SECRETARY OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA; AND LYNN R. NELSON, EXECUTIVE DIRECTOR, BUREAU OF STATE LOTTERIES,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner Walter Ruman respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 19, 1979.

OPINION BELOW

No opinion was rendered by the Court of Appeals for the Third Circuit; a copy of the judgment order appears in the appendix hereto. The opinion of the District Court for the Middle District of Pennsylvania, reported at 462 F. Supp. 1355 (M.D. Pa. 1979), appears in the appendix hereto.

JURISDICTION

The judgment order of the Court of Appeals for the Third Circuit Court was entered on November 19, 1979, affirming the dismissal of this action. No petition for a rehearing was filed. This petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals for the Third Circuit, by affirming without opinion the decision of the United States District Court for the Middle District of Pennsylvania, has improperly granted immunity under the Eleventh Amendment of the United States Constitution to a private state-run lottery. This is an issue which has not been but should be settled by the Supreme Court of the United States.

(2) Whether the Court of Appeals for the Third Circuit, by affirming without opinion the decision of the United States District Court for the Middle District of Pennsylvania, has extended immunity under the Eleventh Amendment of the United States Constitution in a manner in conflict with applicable decisions of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of another foreign state."

STATEMENT OF THE CASE

When the General Assembly of the Commonwealth of Pennsylvania decided to aid senior citizens, it did so, not by appropriation from the treasury of the state (the general fund), but by legalizing gambling. The legislature loaned One Million ($1,000,000.00) Dollars of "seed money" to an independent lottery fund. The lottery fund by law was obligated to and did pay the seed money back to the state treasury before June 30, 1972. After the money was repaid, the lottery fund was restricted by law to pay out money only for specifically enumerated purposes. These included tax rebates and free public transit for the elderly, lottery prizes, and administrative costs. No lottery funds are made available for the general purposes of the Commonwealth.

The lottery in Pennsylvania has been a notably successful operation. Widespread television and radio advertising campaigns paid for from the lottery fund's administrative budget solicit the participation of residents of neighboring states, as well as citizens of Pennsylvania. The lottery boasts that "not one cent of tax dollars" had gone to its maintenance. The legislators who created the lottery fund adamantly refused all amendments which would have commingled lottery funds with the public's treasury.

The Plaintiff in this case is a citizen of Ohio who purchased a lottery ticket in Pennsylvania. He and others similarly situated have claimed that the lottery fund administrators refused to award the prizes properly won

and properly claimed. The District Court for the Middle District of Pennsylvania and the United States Court of Appeals for the Third Circuit granted the Defendants' motions to dismiss which were grounded on the Eleventh Amendment immunity of the state from suit in federal courts.

The courts below have held that the independent lottery fund which does not depend on state tax revenues is the alter ego of the general fund of the Commonwealth.

Your Honorable Court has not yet had the opportunity to decide whether states which create businesses independent of the public treasury may avoid suit in federal court by donning the cloak of Eleventh Amendment immunity. Your Plaintiff believes that the failure of the federal court to exercise jurisdiction in this matter will leave him and the class he seeks to represent without a neutral forum in which to press his action.

REASONS FOR GRANTING THE WRIT

---

(1) Whether the Court of Appeals for the Third Circuit, by affirming without opinion the decision of the United States District Court for the Middle District of Pennsylvania, has improperly granted immunity under the Eleventh Amendment of the United States Constitution to a private state-run lottery. This is an issue which has not been but should be settled by the Supreme Court of the United States.

The state lottery fund as conceived and implemented is completely separate from the general fund of the Commonwealth of Pennsylvania. During the late 1960's and early 1970's, many of Pennsylvania's sister states had passed laws permitting the operation of a state lottery. Pennsylvania was a relatively late entrant into the field. After studying many state and foreign lotteries to profit from their experiences, Senator Mazzei, a prime sponsor of the lottery bill reached several conclusions which formed the basis for the design of the current State Lottery Law, Act of August 26th, 1971, P.L. 351, P.S. §3761-1 et seq.

First, it was believed essential that the funds of the Lottery be maintained separately from tax revenues paid into the General Fund which is the state treasury of the Commonwealth of Pennsylvania.

> "Regardless of the amount of revenue actually realized, we feel the effort to tap this additional source should be made in the public interest. *Since*

the lottery operation is to be self-sustaining, we would be creating *no additional monetary burden on the operation of State Government."* (Emphasis added.)

Legislative Journal of the Senate, April 21, 1971, at 278.

Second, a governing principle of the lottery would be to earmark the money in the lottery fund for use only for specific statutory purposes.

"The merit of giving property tax relief to certain elderly citizens would hardly be challenged. The idea of using lottery revenues for this purpose can be further justified. There is ample evidence in the conduct of existing lotteries and professional polls on the subject to indicate that there is a definite desire on the part of a significant segment of the public to have funds from public lotteries earmarked for some specific and worthwhile purpose. Public opinion surveys in New York and New Jersey reveal that twenty to thirty percent of those who purchase State lottery tickets indicated that their decision to do so was based, at least in part, on their approval of the use of which the funds were to be put. No doubt many more who are not primarily motivated by that concern, or, perhaps, will not ever purchase a ticket, are more likely to accept the State lottery because the money raised is going to a popular and worthwhile public cause."

"Furthermore, Mr. President, money simply lumped in a General Fund of several billion dollars is very very easily lost sight of, particularly in the opinion of the general public. This lack of visibility

is bound to encourage criticism about the spending of the money, and perhaps, even about the integrity of the lottery. A separate fund for a specific purpose is readily understandable and will minimize criticism and charges of illicit use or unwise spending. Lottery promotion is made easier if the use of the funds is well-known and represents a popular cause." (Emphasis added.)

Senate Legislative Journal, supra, at pages 278-279.

When the Senate Bill moved on to the House for second consideration, the Representative of Lehigh County, Mr. Ritter, offered an amendment providing that lottery revenues be deposited in the general fund for general state purposes. See House Legislative Journal of June 23, 1971, at page 853:

"Mr. Speaker, the purpose of these amendments is to remove any reference to tax relief for senior citizens from Senate bill No. 618 and, instead, take the proceeds from the lottery and put them in the general fund."

Mr. Ritter further explained,

"I am simply saying that we should not clutter up the issue with another fund. Let us put all the money in the general fund and provide the tax relief for senior citizens through the general fund."

House Legislative Journal, June 23, 1971 at page 855.

This proposed amendment was soundly defeated by a vote of 128 to 68, Id. pg. 855. Senate Bill 618 ultimately emerged as the State Lottery Law providing for the strict segregation of lottery funds.

True to Senator Mazzei's initial intent, Section 12(a) of the Lottery Law, 72 P.S. §3761-12 provided in pertinent part:

> "(a) All moneys received from the operation of the State lottery shall be deposited in a State Lottery Fund which is hereby created. Such moneys shall be used to the extent necessary for the payment of lottery prizes but the amount so used *shall not be less than forty percent* of the amount of which tickets or shares have been sold. All payments of lottery prizes and for expenses of operation of the lottery shall be made as provided by law. All moneys remaining after payment of prizes and operating expenses shall be transferred to the General Fund through June 30, 1972, *after which date they shall remain in the State Lottery Fund* and shall be allocated for the purpose of providing property tax relief for the elderly for taxes paid in 1971 and thereafter pursuant to the provisions of the act of March 11, 1971 (P.L. 104) known as the 'Senior Citizens Property Tax Assistance Act,' and for the purpose of providing local transit for the elderly pursuant to the act of January 22, 1968 (P.L. 42), known as the 'Pennsylvania Urban Mass Transportation Assistance Law of 1967.' . . ." (Emphasis added.)

Pursuant to Section 16 of the Lottery Law, the fund was initially created by a *loan* of one million dollars from General Fund revenues which was repaid to the general fund from lottery revenues by June 30, 1972. Thereafter the lottery fund moneys were made available only for specific purposes:

> "(b) The moneys in said State Lottery Fund shall be appropriated only:

> (1) For the payment of prizes to the holders of winning lottery tickets or shares;
>
> (2) For the expenses of the division in its operation of the lottery;
>
> (3) For property tax relief and free local transit for the elderly as provided under section 12 of this act; and
>
> (4) For transfer to the General Fund through June 30, 1972, and for the repayment to the general fund of the amount appropriated to the fund pursuant to section 16 of this act."
>
> 72 P.S. §1351-12(b).

Under Section 12, therefore, it was mandated that not less than forty per cent of lottery revenues were to be used for the payment of prizes. Section 6(a)(11)(iv) provides that no less than thirty per cent of the total revenues were to be used for the benefit of senior citizens as set forth in Section 12, supra.

There is, therefore, no possibility either actual or theoretical that Plaintiff's claims would be paid from the state treasury or even have an ancilliary effect on the General Fund. This is the key issue presented on appeal before your Honorable Court.

The representative Plaintiff does not dispute the lower Court's assertion that *if* the claims involved here required the retroactive payment of funds directly from the State Treasury, they would be barred by the Eleventh Amendment to the United States Constitution. This is clearly the holding of *Edelman v. Jordan,* 415 U.S. 651, 667, n. 12, 39 L.Ed. 2d 662, 675, n. 12 (1974).

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability *which must*

be paid from the public funds in the State treasury is barred by the Eleventh Amendment." (Emphasis added.)

At 415 U.S. 663.

In *Fitzpatrick v. Bitzer,* 427 U.S. 445, 49 L.Ed. 2d 614 (1976); petitioners in the District Court sought to have retroactive benefits paid from trust funds operated by the State of Connecticut for the retirement of its employees. Although the contention was raised in the lower Court that the pension funds were not part of the State Treasury of Connecticut, this issue was apparently not preserved on appeal. The Supreme Court left open the issue raised by the instant case (427 U.S. at pg. 452).

Indeed, in a concurring opinion in *Fitzpatrick,* supra, Justice Stevens, distinguished *Edelman,* supra, as follows:

"The holding in *Edelman* does not necessarily require the same results in this case; *this award will not be paid directly from the state treasury but rather from two separate and independent pension funds.* The fact that the state will have to increase its future payments into the fund as a consequence of the award does not, in my opinion, sufficiently distinguish this case from other cases in which a State may be required to conform its practices to the Federal Constitution and thereby to incur additional expenses in the future. Since the rationale of *Ex Parte Young* remains applicable to such cases, and since this case is not squarely covered by the holding in *Edelman,* I am persuaded that it is proper to reject the Eleventh Amendment defense." (Emphasis added.)

427 U.S. at 459-60.

Plaintiff's recovery in the case at bar cannot even tangentially effect the state treasury, nor will it require the expenditure of any state funds in the future. Indeed, the Pennsylvania Lottery's 1977-78 "Report to the People" boasts of record sales, record profits and record benefits to senior citizens, "And not one cent came from tax dollars."

---

(2) Whether the Court of Appeals for the Third Circuit, by affirming without opinion the decision of the United States District Court for the Middle District of Pennsylvania has extended immunity under the Eleventh Amendment of the United States Constitution in a manner in conflict with applicable decisions of the Supreme Court of the United States.

The Eleventh Amendment has usually been viewed as a precipitate Congressional response to the decision of the United States Supreme Court in *Chisholm v. Georgia,* 2 Dall. 419, 1 L.Ed. 440 (1973). The United States Supreme Court in *Edelman v. Jordan* (415 U.S. 660-664), accepts this history following the general path taken by historian Charles Warren, 1 C. Warren, *The Supreme Court in the United States History* (Rev. Ed. 1937). The view expressed there is briefly that the original framers of the constitution never intended that the judicial power of the United States as expressed in Article III of the United States Constitution should be used to permit suits against sovereign states by citizens of other states or by foreign subjects. Under this view, the decision in *Chisholm v. Georgia,* supra, is seen as a "betrayal" of the ideals expressed by Hamilton, Marshall and Madison. This view

has been criticized, however (see e.g. Deveney, John Patrick, "The Eleventh Amendment and Federally Protected Rights," 27 Buf. L. Rev. 57, D.P. 73-82 (1978)).

Whatever the original intent of the Eleventh Amendment, injunctive relief against a State or its officials acting in their governmental capacity has been allowed where the effect would be prospective only. *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Edelman v. Jordan, supra, drew a line between retroactive and prospective relief admitting, however, that:

> "the difference will not in many instances be that between day and night."
>
> 415 U.S. at 667.

The rationale apparently for the distinction in *Edelman* is expressed in 415 U.S. 666, note 11 . . .

> "[W]here the state has a *definable allocation* to be used in the payment of public aid benefits, and pursues a certain course of action such as processing of applications within certain time periods as did Illinois here, the subsequent ordering by a Federal Court of retroactive payments to correct delays in such processing will invariably mean that there is less money available for payments for the continuing obligations of the public aid system." (Emphasis added.)

It therefore appears that the key to the *Edelman* decision was the finding that an award of benefits under the circumstances raised in that case would, of necessity, deplete the present funds in the State Treasury which were to be used to aid present and future recipients of public benefits. Since the fund available had previously been

budgeted without regard to the lower Court's order in *Edelman,* the award of payments might severely disrupt the administration of the public aid system. It could, in fact, be detrimental to innocent recipients from whom payments would have to be taken in order to satisfy the Court's award to their fellows.

In the case at bar, as has been shown, the award of prizes to the class of plaintiffs will not and cannot deplete the fund set up for that very purpose and will not deprive future prize winners of the benefits of their good fortune. In fact, since it is within the power of the Secretary of Revenue to create new lottery games and to regulate the odds as well as the amount of winning prizes, the amount of the fund and its surpluses can be made to expand or contract without regard to the budgetary process. The Lottery Fund is thus different in two major respects from the State Treasury. First, it neither receives nor expends tax monies or public funds but rather depends upon the voluntary participation of citizens of the Commonwealth and other states in the gambling games which it oversees. Secondly, the amounts in the Lottery Fund are not limited by budget on a year to year basis and can be made to fluctuate with the price of tickets, odds of the different games and the amount of prizes to be awarded. Under these circumstances, no conceivable effect on the state treasury or public administration such as those barred by the Eleventh Amendment can exist.

The Commonwealth of Pennsylvania is, for want of a better phrase, running this game, "on the side" and not as part of its traditional budgeted state functions.

From recent decisions in the Supreme Court including *Mt. Healthy City School District Board of Education*

v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977) and *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed. 2d 522 (1978), it is apparent that the United States Supreme Court does not easily extend the protection of the Eleventh Amendment except where the relief requested would require the retroactive payment of funds from the general state treasury when those funds are limited by a *previously existing* state budget.

Whether or not the individual Defendants in this case can be made to respond to the class of Plaintiffs also hinges upon your Honorable Court's construction of the nature of the lottery fund. If your Honorable Court decides that the lottery fund is not an alter ego of the general fund of the Commonwealth of Pennsylvania, then it is apparent that the individual Defendants can be made to respond.

Plaintiffs do not assert, naturally, that the individual Defendants should be made to pay from their own pocket. In *Hutto v. Finney,* supra, the Supreme Court faced with a similar question with regard to attorney's fees specifically approved the District Court's direction that attorney's fees be paid out of the funds of the Arkansas Department of Correction. In a like manner, any money found due to the Plaintiff's class would be paid directly from the state lottery fund. See also *Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed. 2d 745 (1977).

CONCLUSION

As state and local governments become increasingly involved in pursuits traditionally the province of private enterprise, it becomes more and more important to separate those functions which are for the benefit of all the citizens and hence are budgeted from year to year by the legislature from the general treasury of the state from those functions which are self-sustaining by virtue of voluntary participation of the citizens of the state and of other states.

There is no neutral forum in which the rights of the Plaintiff and the class he seeks to represent may be heard. Clearly, the intent of the Pennsylvania state legislature was to create a fund which, although administered by state officials, was separate and apart from the general fund. Indeed, the treasurer of the Commonwealth of Pennsylvania has no power over the lottery funds. The Commonwealth of Pennsylvania should not be permitted to claim paternity for the state lottery fund with one breath while it denies any obligations of support. There is here presented for your Court's consideration questions specifically reserved in *Fitzpatrick v. Bitzer,* supra. For all these reasons, it is respectfully requested that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

BENJAMIN & ANGINO, P.C.,

NEIL J. ROVNER,

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this day of February, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Edward G. Biester, Jr., Esquire, Counsel for Respondent, at the Pennsylvania Department of Justice, Main Capitol Annex, Harrisburg, Pennsylvania 17120. I further certify that all parties required to be served have been served.

NEIL J. ROVNER
Counsel for Petitioner
4503 N. Front Street
Harrisburg, Pennsylvania 17110

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 77-814

Walter Ruman, and all others similarly situated,
Plaintiffs

vs.

Commonwealth of Pennsylvania, Department of Revenue; Commonwealth of Pennsylvania, Department of Revenue, Bureau of State Lotteries; Milton Lopus, Secretary of Revenue of the Commonwealth of Pennsylvania; and Lynn R. Nelson, Executive Director, Bureau of State Lotteries,
Defendants

MEMORANDUM

Walter Ruman, a citizen of Ohio, has brought this action against the Pennsylvania Department of Revenue, the Bureau of State Lotteries of the Pennsylvania Department of Revenue, Milton Lopus, the Pennsylvania Secretary of Revenue, and Lynn R. Nelson, Executive Director of the Bureau of State Lotteries for the Pennsylvania Department of Revenue alleging that his winning ticket in

the Big Fifty Bonus Lottery No. 3 entitled him to a Winnebago Elandan II motor home worth approximately $29,000 and that instead the Defendants offered him a Winnebago Brave motor home with an approximate value of $13,000.

An amended complaint was filed on October 27, 1977 and all of the Defendants have moved to dismiss the amended complaint. All briefs having been filed and oral argument having been held, the matter is now ripe for disposition. For the reasons which follow, the motions to dismiss will be granted.

The Bureau of State Lotteries was created by the "State Lottery Law", Act of August 26, 1971, P.L. 351, and the bureau is contained within the Pennsylvania Department of Revenue. The Defendants established a Big Fifty Bonus Lottery No. 3, which was operated and administered by Defendants Lopus and Nelson, with prizes to be paid from the State Lottery Fund. It is averred that this fund, created by Section 12 of the State Lottery Law, is independent of the general funds of the Commonwealth of Pennsylvania. It is further averred that the Defendants, through their agents and servants offered tickets in the Big Fifty Bonus Lottery No. 3 representing pictorially as a prize a Winnebago Elandan II motor home valued at approximately $29,000.

Walter Ruman was one of the winners of the Big Fifty Bonus Lottery No. 3. He was informed by agents and servants of the Defendants, Pennsylvania Department of Revenue and Bureau of State Lotteries, Milton Lopus and Lynn K. Nelson, that he would be offered a Winnebago Brave motor home as his prize. The Winnebago Brave is alleged to have a value of approximately $13,000. In failing to award the Elandan II motor home, the Defendants are alleged to have breached their contract with the Plaintiff and to have deprived the Plaintiff of his property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The amended complaint is divided into four "claims". The first claim is a diversity action in assumpsit with jurisdiction based upon 28 U.S.C. §1332, the second claim is brought pursuant to 42 U.S.C. §1983 with jurisdiction based upon 28 U.S.C. §1343, the third claim asks for an injunction and seeks to enjoin the Defendants from paying into the State Lottery Fund or otherwise making unavailable to the Plaintiff an amount of money sufficient to satisfy his claim and claims of other potential class members pending the outcome of this litigation. The complaint further alleges in claim four that the Defendants violated the Pennsylvania Unfair Trade Practice and Consumer Protection Law of November 24, 1976, P.L. 1166, as amended, 73 P.S. §201-2(4)(vii), (ix) and (xvii). The amended complaint is prefaced by certain class allegations which are based upon diversity of citizenship under 28 U.S.C. §1332. A class action determination was stayed by an order of Court dated November 22, 1977, pending resolution of the motions to dismiss.

The assumpsit claim alleges that Walter Ruman, relying upon the representation on the tickets of the Big Fifty Bonus Lottery No. 3, purchased a ticket for the March 2, 1977 drawing for $.50 (fifty cents). Plaintiff Walter Ruman's Bonus Ticket Number 716180 was selected as a winning number in the drawing of March

2, 1977. He made a claim for the Winnebago Elandan II motor home he believes was the prize he won within the prescribed time and in the prescribed manner as set forth in the state lottery law. He was not awarded the Winnebago Elandan II motor home he avers was advertised by Defendants, but instead was offered a Winnebago Brave of lesser value. He asks for judgment in an amount representing the difference in value between a Winnebago Elandan II and a Winnebago Brave, or in the alternative for the award of a Winnebago Elandan II motor home.

Claim two avers that the Defendants under color of state law have caused Plaintiff to be subjected to a deprivation of his rights to be secure in his property in violation of 42 U.S.C. §1983 and asks for the same damages as in claim one.

As we stated above, claim three is for an injunction to preserve a fund from which damages could be awarded if found to be warranted.

The fourth claim alleges that the Defendants caused advertisements to appear on the face of Big Fifty Bonus Lottery No. 3 tickets and in other documentary material representing a Winnebago II motor home, and that members of the general public as well as the Plaintiff and members of his putative class were mislead into believing the Elandan II model of motor home would be awarded as a prize in the Big Fifty Bonus Lottery No. 3. The Defendants are alleged to have intended to award to prize winners only a Winnebago Brave motor home of substantially lesser value than the Winnebago Elandan II motor home, and the Defendants are therefore alleged to be in violation of the Pennsylvania Unfair Trade Practices and

Consumer Protection Law. Plaintiff asks for treble damages on this claim as provided by the statute. Act of December 17, 1968, P.L. 1224, §9.2 as amended, 73 P.S. §201-9.2.

The dispute revolves around the fact that the back of the lottery ticket states:

> "On the drawing date printed on your ticket a 6-digit number will be drawn. Match the number with one of the numbers on your bonus game ticket and *win the prize shown on the front of the ticket.* Claim your prize at any official winner validation center (State Liquor Store). Detach left hand portion of ticket when claiming bonus prizes. Tickets may be eligible for bonus prizes as well as weekly cash prizes.
>
> IMPORTANT: This ticket is valid only for drawing date shown. Prizes must be claimed by dates to be announced. *Determination of winners is subject to the rules and regulations of the Pennsylvania Bureau of State Lotteries, Department of Revenue."* (Emphasis supplied.)

The Plaintiff claims the front of the ticket depicts a $29,000 Winnebago whereas the Defendants' position is that whether or not the front of the ticket shows the more expensive Winnebago, which they deny, the language on the back of the ticket indicates that "Determination of winners is subject to the rules and regulations of the Pennsylvania Bureau of State Lotteries, Department of Revenue," and the regulations published in the Pennsylvania Bulletin indicated that the prize was to be the less expensive Winnebago.

For the purposes of a motion to dismiss the Court must accept as true all well-pleaded allegations contained in the complaint and must construe them in the light most favorable to Plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 40 L.Ed. 2d 90 (1974); *Helstocki v. Goldstein,* 552 F. 2d 564 (3d Cir. 1977).

If the essence of an action involves recovery of funds which must be paid from the state treasury, the state is the real party in interest and is entitled to invoke its Eleventh Amendment immunity. *Farr v. Chesney,* 441 F. Supp. 127 (M.D. Pa. 1977). The Plaintiff argues that the recovery in this case will not be paid from the public treasury, but rather will come from a separate and distinct fund or will have only an ancillary effect on the state treasury and therefore the Eleventh Amendment is no impediment to this suit. The Plaintiff argues that the state has established what is in effect a business similar to private businesses.

The powers and legal form, and the functional autonomy and extent of independent financing of the entity, in question as defined by applicable state law, are crucial to the Eleventh Amendments's application. *Unified School District No. 480 v. Epperson,* 551 F.2d 254 (9th Cir. 1977). The Pennsylvania State Lottery Law, Act of August 26, 1971, P.L. 351, as amended, 72 P.S. §3761 et seq., provides in pertinent part:

> "All monies received from the operation of the State Lottery shall be deposited in a State Lottery Fund which is hereby created." 72 P.S. §3761-12.

Pursuant to the State Lottery Law the State Lottery Fund was originally created and funded by a one million dollar appropriation from the state's general fund, and

pursuant to Section 12(b) (4) of the State Lottery Law, that appropriation was repaid to the general fund by June 30, 1972. Section 12 of the Pennsylvania Lottery Law also provides that not less than forty per cent of the amount received from the operation of the State Lottery is to be used for the payment of lottery prizes. Pursuant to Section 6a(11) (iv) not less than thirty percent of the revenues accruing from the sale of lottery tickets is dedicated to aiding the financing of the Senior Citizens Property Tax Assistance Act, Act of March 11, 1971, P.L. 104, as amended, 72 P.S. §475-1 et seq., and the Pennsylvania Urban Mass Transportation Assistance Law, Act of January 22, 1968, P.L. 42, as amended, 66 P.S. §1951 et seq. Therefore some 30% of the revenues which are available go to meet the operational costs of the lottery.

In *Transamerica Insurance Co. v. Judie, Inc.,* 30 Pa. Commw. Ct. 259, 273 A.2d 478 (1977) the Pennsylvania Commonwealth Court held that the Bureau of State Lotteries was an integral part of the Commonwealth, in view of the fact that the Bureau itself did not make the necessary rules and regulations for its own government, but rather the Pennsylvania Secretary of Revenue was given such authority and in view of the fact that the Bureau's development was financed by the Pennsylvania Legislature and any shortage of funds needed to meet the Bureau's statutory obligations was to be appropriated from the state's general funds. Section 4 of the State Lottery Law specifically states that the Bureau is created "within the Department of Revenue". 72 P.S. §3761-4. Section 6 of the law places upon the Pennsylvania Secretary of Revenue the duty of administering the lottery. 72 P.S. §3761-6. As stated in *Transamerica,* the Pennsylvania

Secretary of Revenue has "the power to establish the type of lottery to be conducted, the prices of tickets, the prizes to be awarded and the power to regulate the licensing of agents for the sale of tickets." 373 A.2d at 480. Although the State Lottery Fund is not coextensive with the general fund, the money in the State Lottery Fund belongs to the state.

A waiver of the Commonwealth's Eleventh Amendment immunity must be found in a clear declaration of a state's intention, and the Pennsylvania General Assembly has established a Board of Arbitration of Claims having original jurisdiction to hear claims arising out of contracts entered into by the Commonwealth. Act of May 20, 1937, P.L. 728 No. 193, as amended, 72 P.S. §4561-1 et seq. This limited waiver of immunity in contract actions has now been supplemented by the Act of September 12, 1978, Act No. 78-152 relating to certain tort actions, however none of this legislation specifically waives Eleventh Amendment immunity in federal courts. In fact, Act No. 78-152 provides in Section 5 (E) that "nothing contained in this Act shall be construed to waive the Commonwealth's immunity from suit in federal courts guaranteed by the Eleventh Amendment to the United States Constitution."

The assumpsit action based upon diversity of citizenship is barred by the Eleventh Amendment. The state is not a citizen for purposes of federal diversity jurisdiction. *Litton FCS, Inc. v. Pennsylvania Turnpike Commission,* 376 F. Supp. 579 (E.D. Pa. 1974), and the Commonwealth of Pennsylvania, the Department of Revenue, and the Bureau of State Lotteries are all integral parts of the Commonwealth. The naming of Milton Lopus as

Secretary of Revenue of the Commonwealth of Pennsylvania and Lynn R. Nelson as Executive Director of the Bureau of State Lotteries does not change the fact that an action in assumpsit is necessarily one against these persons in their official capacities as any contract was not with these men individually. A judgment would come from Bureau funds and therefore is barred by the Eleventh Amendment.

The action pursuant to 42 U.S.C. §1983 raises a slightly different Eleventh Amendment problem. As stated in *Bagby v. Beal,* No. 77-758 (Memorandum and Order of August 24, 1978, M.D. Pa., per Muir, J.) monetary relief may not be had against a state which has not waived its Eleventh Amendment immunity absent at least a specific statement of Congressional intent to permit such awards. See, *Fitzpatrick v. Bitzer,* 427 U.S. 445, 49 L. Ed. 2d 614 (1976). *Edelman v. Jordan,* 415 U.S. 651, 39 L.Ed. 2d 662 (1974) rejected the argument that 42 U.S.C. §1983 was intended to create a waiver of the states' Eleventh Amendment immunity. This has not been changed by the two recent United States Supreme Court decisions in *Monell v. Department of Social Services,* U.S. , 56 L.Ed. 2d 611 (1978) or *Hutto v. Finney,* U.S. , 57 L.Ed. 2d 522 (1978).

Monell held local governments were intended to be included among the "persons" to which §1983 applies and that local government bodies can be sued directly under §1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. It was specifically

stated in *Monell* that the holding was limited to local government units which are not considered part of the state for Eleventh Amendment purposes. It has long been established that while county action is generally state action for purposes of the Fourteenth Amendment, a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment. *Edelman v. Jordan,* 415 U.S. 651, 667, n. 12, 39 L.Ed. 2d 662, 675, n. 12 (1974).

Hutto v. Finney, supra, held that the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988 authorized the award of attorneys' fees against public officials in their official capacities to be paid out of the state treasury because the act imposes attorneys' fees as part of the costs of litigation. The Court stated that an award of costs has traditionally been made without regard to the Eleventh Amendment immunity of the states and that it was permissible for Congress to amend its definition of taxable costs and have the amended class of costs applied to the states without expressly stating that it intended to abrogate the state's Eleventh Amendment immunity.

Prior to Act No. 78-152 relating to tort actions against the Commonwealth, the Pennsylvania Supreme Court held in *Mayle v. Pennsylvania Department of Highways,* 479 Pa. 384, 388 A.2d 709 (1978), that the sovereign immunity of the Commonwealth of Pennsylvania was not a bar to a tort action filed in state court by a plaintiff who alleged he was injured by the negligent maintenance of a legislative route by the Pennsylvania Department of Highways. Neither the common law concept of sovereign immunity nor Article I, Section 11 of

the Constitution of Pennsylvania was a bar to the suit. The Eleventh Amendment to the United States Constitution was mentioned briefly in the opinion pointing out that the Pennsylvania Legislature failed to ratify the Eleventh Amendment proposed by Congress. We do not believe the *Mayle* decision can be construed as holding that the Commonwealth of Pennsylvania has consented to awards of damages against it in a federal court in actions brought pursuant to 42 U.S.C. §1983. The law in at least three circuits holds that a state's consent to be sued in its own courts is not necessarily a waiver of its Eleventh Amendment immunity. See, *Richins v. Industrial Construction, Inc.,* 502 F.2d 1051 (10th Cir. 1974); *Scott v. Board of Supervisors,* 336 F.2d 557 (15th Cir. 1964); *Markham v. City of Newport News,* 292 F.2d 711 (4th Cir. 1961); see also, *S. J. Groves & Sons Co. v. New Jersey Turnpike Authority,* 268 F. Supp. 568 (D. N.J. 1967). The Third Circuit Court of Appeals has recognized a distinction between sovereign immunity and the immunity which exists under the Eleventh Amendment. See, *O'Neill v. Pennsylvania,* 459 F.2d 1, 2 (3d Cir. 1972). In *Daye v. Pennsylvania,* 483 F.2d 294 (3d Cir. 1973), *cert. denied* 416 U.S. 946 (1974), the Third Circuit Court of Appeals stated that although a state may waive its Eleventh Amendment immunity, the conclusion by a court that there has been a waiver will not be lightly inferred and when a waiver does take place it must be clear and unequivocal. The opinion of the Pennsylvania Supreme Court in *Mayle* was not such a clear and unequivocal statement.

As we stated earlier in dismissing the diversity suit, we believe that Milton Lopus as Secretary of Revenue,

and Lynn R. Nelson, as Executive Director of the Bureau of State Lotteries have been named as nominal parties in what is essentially a breach of contract claim against the Commonwealth, and therefore we shall dismiss the §1983 claim against Lopus and Nelson as well.

Even if the individual Defendants were not immune from suit under the Eleventh Amendment, we do not believe the complaint adequately alleges a property interest of which the Plaintiff has been deprived. We must look to the nature of the alleged interest to see if it is within the Fourteenth Amendment's protection of life, liberty and property. *Roth v. Board of Regents,* 408 U.S. 564, 33 L.Ed. 2d 548 (1972). The property interests protected are not created by the Constitution, but rather are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. See, *Bishop v. Wood,* 426 U.S. 341, 48 L.Ed. 2d 684 (1976).

The Defendants argue that Plaintiff was not deprived of a property interest because he had no legitimate claim of entitlement. On January 17, 1977 Secretary Lopus adopted and published amendments to Chapter 28 of the Bureau's Rules and Regulations relating to Big Fifty Bonus Game Number 3, the game at issue in this case. Section (4) (a) of those amendments established the value of the prize to be awarded in this lottery game at approximately $13,000. 7 Pa. Bulletin 254.255 (January 29, 1977). That section provides:

> "Owners of tickets with the 6-digit number appearing on the stub under the caption 'Match either

> number below—win a Winnebago' matching the 6-digit number drawn shall be awarded a 1977 Winnebago Motor Home plus $2,734.25 cash for a total prize of $13,674.25."

The Plaintiff states in his complaint that he was in fact offered this prize. A misrepresentation or incorrect description of government benefits does not vest in a person an enforceable legal or equitable right to the misrepresented benefits. See, *Pennsylvania Association of State Mental Hospital Physicians v. State Employee's Retirement Board,* 31 Pa. Commw. Ct. 151, 375 A.2d 863 (1977).

Even if a Plaintiff alleges facts sufficient to show a deprivation of a property interest if he was afforded all the process which the Constitution requires then he has not stated a cause of action. The United States Constitution, rather than state law, defines what process is due. See, *Bishop v. Wood,* 426 U.S. 341, 48 L.Ed. 2d 684 (1976); *Bagby v. Beal,* 439 F. Supp. 1257, 1261 (M.D. Pa. 1977). Minimum requirements of due process generally are notice of the basis for governmental action and an opportunity to be heard. See, *Wolff v. McDonnell,* 418 U.S. 539, 41 L.Ed. 2d 935 (1974); *Morrissey v. Brewer,* 408 U.S. 471, 33 L.Ed. 2d 484 (1972). Even if Plaintiff's claim of a deprivation of property was considered established, he does not assert that he has been deprived of his property without a hearing, and one is provided for pursuant the Act of May 20, 1937, P.L. 728, No. 193, as amended, 72 P.S. §4651-1 et seq., with the Pennsylvania Board of Arbitration of Claims. Furthermore, what the complaint basically alleges is a breach of contract, and were we to adopt Plaintiff's theory of

action pursuant to 42 U.S.C. §1983, anytime Commonwealth officials were alleged to have breached a contract a Plaintiff would have an action in federal court for deprivation of property without due process of law. We do not believe this was the intention of the civil rights statute, especially when a state procedure for determining such a dispute exists.

A violation of the Pennsylvania Unfair Trade Practice and Consumer Protection Law, Act of December 17, 1969, P.L. 1224, §§2(4)(vii), (ix) and (xvii), 72 P.S. §201-2(4) (vii, ix, and xvii) does not give rise to an action under 42 U.S.C. §1983 as it is a state law claim involving no federally secured right. See, *Nationwide Amusements, Inc. v. Nattin,* 325 F. Supp. 95 (W.D. Pa. 1971).

To enable this Court to exercise pendent jurisdiction over an assumpsit claim or the state unfair trade practice action, if it was applicable to this situation, the Plaintiff would have to raise a substantial federal claim involving a common nucleus of operative fact. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 16 L.Ed. 2d 218 (1966). As we are dismissing the federal claims, in the exercise of our discretion we shall dismiss the pendent state claims as well. As we are dismissing this case there is no need to proceed with Plaintiff's request for a class action or for an injunction ordering certain funds to be held by the Bureau of State Lotteries to pay a possible judgment in this case.

An appropriate order dismissing this action will be entered.

(s) R. Dixon Herman
R. Dixon Herman
United States District Judge

Dated: January 8th, 1979

Judgment Order

UNITED STATE COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 79-1344

Walter Ruman, and all others similarly situated,
Appellant

v.

Commonwealth of Pennsylvania, Department of Revenue; Commonwealth of Pennsylvania, Department of Revenue, Bureau of State Lotteries; Milton Lopus, Secretary of Revenue of the Commonwealth of Pennsylvania; and Lynn R. Nelson, Executive Director, Bureau of State Lotteries
(Civil No. 77-0814, M.D. of Pa.)

Submitted Under Third Circuit Rule 12 (6)
November 15, 1979

Before: Seitz, *Chief Judge,* Aldisert, *Circuit Judge,* and Teitelbaum, *District Judge.**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is,

---

* Hubert I. Teitelbaum, Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Judgment Order

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,
(s) Seitz
Chief Judge

Attest:
Thomas F. Quinn
Clerk

Certified as a true copy and issued in lieu of a formal mandate on December 11, 1979.

Test:
Thomas F. Quinn
Clerk, United States Court of Appeals for the Third Circuit

Dated: Nov. 19, 1979.